Technology Service Solutions *and* International Brotherhood of Electrical Workers, AFL–CIO, Local 111. Cases 27–CA–13971 and 27–CA–13971–3

August 22, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On September 20, 1996, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel and the Union filed exceptions and supporting briefs, the Respondent filed an answering brief, and the General Counsel and the Union filed reply briefs.

The Natinal Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided not to affirm the judge's rulings, findings, and conclusions and instead to remand this case to the judge for further proceedings.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by refusing, in July 1995, to provide the Union with a list of names and addresses of bargaining unit employees where there was no reasonable alternative means for the Union to communicate with the employees. The complaint also alleges that, in June 1995, the Respondent, through Customer Service Manager Leonard, violated Section 8(a)(1) by threatening to discipline an employee if he called other employees regarding unionization, promising him a pay increase if he refrained from union activity, and threatening to withhold the pay increase if the Respondent's employees selected a union as their collective-bargaining representative. Following close of the General Counsel's case at hearing, the Respondent moved to dismiss the complaint. The judge adjourned the hearing and, after submission of briefs, issued a decision granting the motion and dismissing the complaint.

Based on the evidence adduced in the General Counsel's case at hearing, including certain stipulations of fact entered into by the parties, the facts are as follows. The Respondent installs, services, and repairs computer systems nationwide. Computer manufacturers and retailers contract with the Respondent to perform warranty or service contract work for purchasers of their computer equipment. The Respondent also is directly engaged by other businesses for computer installation and maintenance.

The employees who perform computer installation, maintenance, and service work for the Respondent are called customer service representatives (CSRs). In its Southcentral Region, covering Colorado, New Mexico, Oklahoma, Kansas, Missouri, Arkansas, and parts of Nebraska and Wyoming, the Respondent employs 236 CSRs.[1] The region, headed by Regional Manager Shackelford, is divided into eight or nine territories, each overseen by a customer service manager (CSM), who supervises the CSRs. The CSRs generally perform their duties in specific geographic areas within their CSM's territory.

The Respondent has no offices in the region other than its regional headquarters in Englewood, Colorado, a Denver suburb. CSRs are geographically dispersed and do not report to work at any central location. Rather, they work out of their homes or vehicles and spend most of their time at customers' locations. CSRs generally receive assignments and communicate with their CSMs, the regional office, and the Respondent's dispatch center through a computerized wireless dispatch system. Each CSR is supplied with a hand-held portable terminal, referred to as a ''brick,'' which enables CSRs to receive and dispatch messages, order parts, and document work assignments.[2] Each brick has the capacity to send and receive messages of only 72 to 256 characters, depending on the type of message.

CSRs have limited contact with each other. They are geographically dispersed and usually work alone. On occasion, however, CSRs from neighboring areas are assigned to work together on a larger project. Additionally, Shackelford testified that 12 CSRs are permanently stationed at a Boeing Company facility in Wichita, Kansas, 7 or 8 are stationed at an IBM facility in Boulder, Colorado, and a smaller, unspecified number are stationed at a facility of Twentieth Century Insurance in Kansas City.[3] CSRs also gather annually for a regional ''kickoff'' meeting. At least in Colorado, monthly territory meetings are also held, but CSRs located away from Denver often choose not to attend and, instead, are provided minutes of the meetings. Training sometimes takes place on a national basis. CSRs attending such training sessions may interact with CSRs from other territories and other regions at those sessions.

The Respondent does not have a central parts warehouse. Rather, CSRs keep supplies of commonly used parts in their vehicles. Additionally, the Respondent allows CSRs to lease space in self-storage facilities in which to maintain a parts inventory. The Respondent also leases space for parts in other companies' larger

[1] The judge's finding that the Respondent employs approximately 150 CSRs in this region is erroneous. As noted infra, it was this Southcentral Region that the employer contended, and the Board agreed, is the only appropriate unit for the CSRs in this area.

[2] About November 1995, subsequent to the events at issue in this case, the Respondent provided some of the CSRs with IBM Thinkpad laptop computers. There is no evidence that the communication capabilities of the Thinkpads supplied to the CSRs differ from those of the ''bricks.''

[3] The Union apparently was unaware of these groupings of CSRs prior to the hearing in this case.

storage facilities and has arranged for its CSRs to be granted access to these facilities. None of the storage facilities are marked with the Respondent's name, nor are they listed in telephone directories. CSRs do not report to parts storage facilities on any schedule but rather go there on an irregular basis. Also, they obtain parts without visiting storage facilities by having parts shipped to the customer's location, delivery service offices, or their own homes.

CSRs do not wear the Respondent's name or logo on their clothing, nor do their vehicles bear the Respondent's name or logo. Most of the Respondent's customers would not know who the Respondent is because, when CSRs make service calls, they usually represent the company that sold the computer equipment to the customer.

After receiving a pay cut in October 1994, CSR Phillips, of Grand Junction, Colorado, contacted the Union about organizing the Respondent's CSRs. Union Organizer Sheridan told Phillips that the Union would need the names and addresses of the CSRs ''so that we could talk to them and see if there was an interest'' in organizing. The Respondent apparently does not provide its CSRs with any list or directory of the names or telephone numbers of the CSRs in the Southcentral Region or in any territory within the region. Consequently, to attempt to compile such a list for Colorado, Phillips, during nonworktime, sent messages via his ''brick'' to about 15 other CSRs in Territories E and X, which together encompass most of Colorado, asking if he could call them at home in the evening and requesting their telephone numbers.

Although he did not know many of the CSRs in Colorado, Phillips was able to obtain their last names and code numbers, which were necessary to send them messages, by using the ''locations field'' on his ''brick.'' Entering ''E-00'' in the locations field would cause the ''brick'' to display the last names and code numbers of CSRs in Territory E; entering ''X-00'' in the locations field would result in the ''brick'' displaying the last names and code numbers of CSRs in Territory X. Phillips used these names and code numbers for directing his messages.

In response to his messages, Phillips received telephone numbers from about 10 or 11 CSRs. By telephoning these CSRs long distance at night from home, he learned the telephone numbers of about 8 or 9 more. In all, he personally telephoned 12 to 15 CSRs. Ultimately, Phillips provided Sheridan with a list of about 30 CSRs' names, with addresses and telephone numbers for some of them. Sheridan and other union representatives then telephoned and mailed union literature to them, called on some of them at their homes, and attempted to track down missing addresses and telephone numbers.[4]

On April 4, 1995,[5] the Union, having calculated that the Respondent employed about 38 CSRs in Colorado, filed a petition seeking to represent them. Informed by the Board's regional office that the showing of interest was insufficient because the Respondent employed about 78 CSRs in Colorado, the Union withdrew the petition. The Union filed a second representation petition, Case 27–RC–7557, on April 25, after obtaining more signed authorization cards. Following a hearing, the Regional Director on June 9 issued a Decision and Direction of Election finding the CSRs in Territory E under the supervision of CSM Leonard to constitute an appropriate unit and the CSRs in Territory X under the supervision of CSM Nero to constitute a separate appropriate unit.

On June 15, Phillips went to Glenwood Springs, about 100 miles from his home, to meet with his supervisor, CSM Leonard, at Leonard's request. During the meeting, Leonard told Phillips that he had received a complaint from another CSR that Phillips had sent him messages about the Union on his brick and he did not want to receive such messages.[6]

The Union was provided a copy of the eligibility list containing the names and addresses of the 63 CSRs in the 2 units on June 17. The mail-ballot election began July 6, with ballots to be counted on July 20. The Respondent, however, filed a request for review of the Regional Director's decision, and, on July 20, the Board issued a Decision on Review and Order, granting the Respondent's request for review and finding that the bargaining units established by the Regional Director were not appropriate and that the only appropriate unit was one covering all of the Respondent's CSRs in its Southcentral Region.

On July 25, the Union sent a letter to the Respondent, which, after noting the Board's finding that the unit must encompass the Respondent's entire Southcentral Region, stated:

> the Employer's highly centralized organization and its use of the Dallas computerized, wireless dispatch system has resulted in a lack of access by those CSRs interested in organizing a union to other CSRs of the Southcentral Region. Said lack of access is interfering with and restraining the CSRs of the Southcentral Region in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act. The Union, therefore,

[4] Two or three of the CSRs who Sheridan was able to contact early in the campaign turned out to be stationed in New Mexico, not Colorado.

[5] All subsequent dates are in 1995, unless otherwise noted.

[6] Evidence concerning subsequent statements Leonard made at this meeting is summarized in the judge's decision. Statements Leonard made in this conversation were alleged to violate Sec. 8(a)(1).

> requests that the Employer remedy this circumstance by providing to the Union forthwith:
>
> 1. The names, addresses . . . of all the CSRs of the Southcentral Region. . . .

On July 31, the Respondent sent a letter to the Union denying its request for the CSRs' names and addresses.[7]

Following the Board's decision that only a regionwide unit was appropriate, Sheridan discussed with Phillips whether there was any way to obtain the names of the CSRs in the rest of the region outside of Colorado. According to Phillips, he told her, ''[H]ow in the world can I . . . contact these people in states that . . . I don't know anybody in?'' He elaborated: ''[T]here is no way that I can afford to drive all over those states and try to get ahold of the people that I don't even know who is out there. . . . There is no way I can get a list of those people because look at the problems I had with just getting a list of the people I work with kind of.''

Subsequent to the representation case hearing, in which the Respondent had advocated a regionwide unit, Phillips had made attempts to contact CSRs in the region outside of Territories E and X using his ''brick.'' He did not know the letter designations of the other territories in the region, as apparently the Respondent did not provide this information to CSRs. Therefore, he experimented with entering various letters and numbers in the locations field of his ''brick'' but was unable to retrieve the names or code numbers of any other CSRs in this manner. Additionally, he had previously tried to contact CSRs who he knew in Champaign, Illinois, and Omaha, Nebraska, via his brick. Although he knew the letter designations of the territories in which they were located, he was unable to retrieve their code numbers.[8] Thus, he doubted that he would have been able to contact other CSRs in the Southcentral Region outside of Colorado even if he had known the designations of their territories.

Following the Board's unit ruling, Phillips also attempted to obtain information from two parts coordinators, Hoffman and Shiveley. On July 31 or August 1, Phillips spoke to Hoffman, who is located at regional headquarters in Englewood, and asked for a list of the names and addresses of the CSRs in the region. Hoffman declined to provide the list. Phillips believed that Hoffman had this information because he mailed parts forms to all the CSRs. Later that day, Phillips spoke to Shiveley, a parts coordinator in Dallas or Kansas City, and asked her for a list of all the CSRs' names and numbers in the region. Shiveley said that she could not supply such a list. She also stated that, even if he had a list, he would be unable to reach the CSRs with his ''brick'' because it is probably not programmed to contact them. Phillips reported his efforts and lack of success to Sheridan.

Following issuance of the Board's decision expanding the unit, Sheridan, in addition to conferring with Phillips, contacted 20 to 25 other CSRs in Colorado but found that they could not identify any CSRs outside of Territories E and X. She also asked the Union's research department to do a search for any additional information about the Respondent. The research department did so but could not find any new information. She also searched library telephone books of the major cities in the Southcentral Region[9] but could find no listings for the Respondent. She asked the international union to check with its representatives in the other States in the region to see if any representatives knew anything about the Respondent or had any information that they could provide her, but none had any such information. The Respondent had put into evidence at the representation case hearing an 8-by-11 inch map of the 8 States of Southcentral Region on which were marked some 76 towns where CSRs were located. Sheridan found this small map, which did not give any CSRs' names or addresses, of no use in trying to contact CSRs.

Sheridan also researched television and radio stations and newspapers in the major media markets in the region. She contacted Denver television stations and a Denver newspaper to get an approximation of the costs of advertising in one media market in the region. She also drew on her knowledge of mass media advertising gained from her more than 10 years as a union organizer and her experience of managing her husband's campaign for the Colorado state house of representatives. Taking into consideration the cost of mass media advertising, her knowledge of its effectiveness, the fact that the audience she wished to reach was about 170 additional CSRs spread over 7 states populated by roughly 20 million people, and the number of media outlets in the major markets in those states, Sheridan concluded that a mass media campaign to reach the CSRs in the region would be astronomically expensive and probably ineffective. Consequently, she did not attempt to mount such a campaign.

In his decision, the judge found that the Respondent's refusal to provide the Union the names and addresses of the CSRs in the Southcentral Region did not

[7] On the same date, the Union filed a motion with the Regional Director to lower the showing of interest requirement for the regionwide unit. On August 2, the Regional Director denied the Union's motion and dismissed the Union's election petition for failing to provide the required showing of interest. On September 5, the Board denied the Union's request for review of the dismissal.

[8] Phillips did not know if the CSR in Omaha was within the Southcentral Region.

[9] Albuquerque, New Mexico; Oklahoma City, Oklahoma; Tulsa, Oklahoma; Wichita, Kansas; Kansas City, Missouri; Little Rock, Arkansas; and Springfield, Missouri.

violate Section 8(a)(1). The judge found that the plain meaning of Section 8(a)(1) requires that an employer must have ''performed some sort of definite action''[10] to interfere with, restrain, or coerce employees in the exercise of their rights in order to violate that section and that the Respondent had performed no such ''overt act.'' Rather, the Respondent ''simply arrang[ed] its business in a manner which has the incidental effect of making it difficult to organize.''[11]

As another basis for his dismissal, the judge found that, by requiring a regionwide bargaining unit and subsequently denying review of the Regional Director's dismissal of the Union's petition for insufficient showing of interest, the Board had already ruled on the Union's right to be provided the CSRs' names and addresses. The Board's denial of review of the Regional Director's dismissal of the petition, the judge reasoned, was an effective denial of a list of the CSRs' names and addresses to the Union, because, had the Board reversed the Regional Director and approved a lower showing of interest requirement, the election would have gone forward and the Respondent would have been required to provide a voter eligibility list, thereby granting the Union the CSRs' names and addresses.

An additional basis for his dismissal was the judge's finding that organizing the CSRs in the Southcentral Region was ''not impossible,'' as shown by the Union's success in organizing the two Colorado territories. Rejecting the General Counsel's contention that the Respondent's business organization is unique, the judge found the dispersion of the CSRs similar to that of route salespeople, delivery personnel, and home health personnel, groups which, according to the judge, have been successfully organized. Finding that there were large concentrations of CSRs in seven cities in the region other than Denver,[12] the judge found that if the Union had actually traveled to those cities or had pursued the two or three New Mexico CSRs who Sheridan had contacted earlier, the Union might have had better success. In the judge's view, the Union never properly pursued the CSRs in States other than Colorado. In sum, the judge concluded that the CSRs were not inaccessible.

The judge also dismissed the complaint allegation that Leonard's statements to Phillips violated Section 8(a)(1). The judge found that, due to inconsistencies between Phillips' testimony and prior statements he had given and notes he had made about this incident, the General Counsel had not presented sufficient credible evidence to warrant directing the Respondent to defend.

Contrary to the judge, we find that the General Counsel presented sufficient evidence supporting each complaint allegation to overcome the Respondent's motion to dismiss and to require that the Respondent be given an opportunity to present evidence in its defense.

Regarding the complaint allegation that the Respondent violated Section 8(a)(1) by refusing to provide the Union with the CSR's names and addresses, we find no basis for the judge's holding that an overt act must occur for an employer to violate Section 8(a)(1). Indeed, the judge appears to have fashioned this requirement out of whole cloth. There are certainly circumstances in which an employer's failure to act may interfere with, restrain, or coerce employees in the exercise of their Section 7 rights; nothing in the statute precludes such failures to act from being found violations of Section 8(a)(1). For example, in cases in which an employer's refusal to grant a union access to the employer's property to communicate with employees violates Section 8(a)(1), such a refusal may be found in the employer's mere failure to respond to the union's request for such access as well as in the employer's express denial of such access.

In *McDermott Marine Construction*, 305 NLRB 617 (1991), as the judge himself notes, the employer at first simply ignored the union's letter requesting access to its barges. Only after the union filed an unfair labor practice charge did the employer respond, refusing the request. The Board's finding that the employer violated Section 8(a)(1) by ''failing and refusing to provide reasonable access to the employees''[13] clearly encompassed both the employer's initial failure to respond to the union's request as well as the employer's subsequent response. Indeed, the outcome surely would have been no different had the employer simply persisted in its failure to respond to the union's letter.

The judge attempts to reconcile *McDermott* with his overt action theory by characterizing the failure of the employer in that case to respond to the union's request as an ''implied bar'' to access and, thus, an overt act. We find this reasoning wholly unpersuasive. In our view, the employer's failure to respond to the union's letter cannot reasonably be called an overt act.[14]

Likewise, in *S&H Grossinger's, Inc.*, 156 NLRB 233, 251, 261 (1965), enfd. 327 F.2d 26 (2d Cir. 1967), cited by the Supreme Court as a ''classic example''[15] of a case warranting union access to employees on their employer's premises, the union requested access three times and received no response. The Board found the employer's failure to respond to these re-

[10] Text accompanying fn. 8 of judge's decision.

[11] Text following fn. 11 of judge's decision.

[12] See cities listed in fn. 9, supra.

[13] 305 NLRB at 619.

[14] Similarly, we do not agree with the judge's statement that, in cases concerning union access to private property, an ''understood part of the analysis'' is that there is always an overt act consisting of at least an ''implied threat to bar entry and to enforce the bar by invoking the trespass laws.'' See text following fn. 10 of the judge's decision.

[15] See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992).

quests, as well as the negative responses it gave to subsequent requests, violated Section 8(a)(1).

In any event, even assuming an overt act were required for the finding of an 8(a)(1) violation, we find without basis the judge's finding that no such act occurred here. The Respondent's letter denying the Union's request for the CSRs' names and addresses certainly constituted an overt act. Indeed, if the employer's failure to respond to the union's request in *McDermott* constitutes, in the judge's view, a sufficient ''overt act'' under his theory to support the finding of an 8(a)(1) violation, the Respondent's actual response to the Union in this case denying the Union's request for the CSRs' names and address certainly must satisfy the judge's ''overt act'' requirement.

An additional basis given by the judge for his dismissal, that the Board in the representation case had already ruled on the Union's right to be provided the CSRs' names and addresses, is in error. A consequence of the Board's denial of review of the Regional Director's dismissal of the Union's petition may have been that the Union did not receive the voter eligibility list that would have been provided had the election gone forward. The issue of whether the Union should be provided such a list, however, was not before the Board for decision in ruling on the Union's request for review of the Regional Director's dismissal of the petition. Rather, the question presented was whether, due to asserted special factors, the Regional Director should have lowered the normal 30-percent showing of interest required for the processing of an election petition. This question simply did not encompass the issue of whether the Union should be provided a list of the CSRs' names and addresses. Moreover, even had the Board in the representation case ruled on whether the Respondent was required to provide a voter eligibility list under the principles of *Excelsior Underwear*, 156 NLRB 1236 (1966), such a ruling would not have determined whether the Respondent's refusal, at issue here, to satisfy the Union's separate request for a list of the CSRs' names and addresses violated Section 8(a)(1). Accordingly, the Board's rulings in the representation case cannot be viewed as resolving the issues presented by the present unfair labor practice case.

We also find it inappropriate to adopt the judge's remaining basis for dismissal, his finding that the Respondent's CSRs in its Southcentral Region are not inaccessible and that organizing them is not impossible. Consequently, we find that the Respondent's motion to dismiss at the close of the General Counsel's case was improvidently granted. Accordingly, we find it necessary to remand this case to allow the Respondent an opportunity to present its evidence.[16]

We also remand the complaint allegation that Leonard's June 1995 statements threatened Phillips and unlawfully promised him a pay increase. In agreement with the General Counsel's and the Union's exceptions, we find that the judge at the hearing improperly prevented the General Counsel from questioning Phillips concerning the circumstances under which his statement was taken by the Respondent's attorney in June 1996. The judge relied on this statement in discrediting Phillips' testimony concerning this complaint allegation. On remand, following testimony from Phillips regarding the circumstances surrounding his June 1996 statement and the Respondent's opportunity to present evidence, the judge should reconsider this complaint allegation.

ORDER

The judge's Decision and Order Dismissing Complaint is vacated and the proceeding is remanded to Administrative Law Judge James M. Kennedy for further proceedings consistent with this decision, including completion of the hearing in this matter, permitting the General Counsel to examine Dennis Phillips concerning the circumstances under which his statement was taken by the Respondent's attorney in June 1996 and permitting the Respondent to present its case concerning both 8(a)(1) allegations. The judge shall thereafter prepare and issue a supplemental decision containing findings of fact, conclusions of law, and a recommended Order. Following service of such supplemental decision and recommended Order on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

CHAIRMAN GOULD, concurring.

I agree with my colleagues that the judge erred in dismissing the complaint at the close of the General Counsel's case, and I join them in remanding the case to the judge for completion of the hearing. I write separately, however, to address the theory underlying the complaint allegation that the Respondent violated Section 8(a)(1) by refusing the Union's request for the CSRs' names and addresses.

In *Republic Aviation*,[1] the Supreme Court held that ''[n]o restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline.''[2]

[16] Member Higgins notes that, as this case presents an issue of first impression, development of a complete record is warranted. Indeed, the judge raised a number of questions about the effects of the General Counsel's 8(a)(1) theory that, in Member Higgins' view, can best be considered on the basis of a full record.

[1] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

[2] *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956), citing *Republic Aviation*, 324 U.S at 803. I have set forth my thoughts on these cases in William B. Gould IV, *Union Organizational Rights and the Concept of 'Quasi-Public Property,'* 49 Minn. L. Rev. 505 (1965), and William B. Gould IV, *The Question of Union Activity*

The Court later stated in *Central Hardware*[3] that the Section 7 right of employees ''to self-organization, to form, join, or assist labor organizations'' includes ''both the right of union officials to discuss organization with employees, and the right of employees to discuss organization among themselves.''[4] The Court further stated: ''[O]rganization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others.''[5]

In this case, the present record demonstrates that CSRs in the Respondent's Southcentral Region have little ability to exercise either the right to discuss organization among themselves or the right to learn from union officials about organization. Due to the Respondent's unusual operational structure, its CSRs are so dispersed and isolated from each other that there is little opportunity for them to discuss organization among themselves or for a union to communicate with them.

Thus, as my colleagues' opinion describes, the 236 CSRs in the Southcentral Region are scattered over 8 states. Unlike the typical employment situation, CSRs do not work at any facility of their employer. Instead, they work out of their vehicles and homes and at customers' locations. Even more unusual, they do not report to work or otherwise regularly gather at any common location. Rather, they receive their assignments and generally communicate with the Respondent remotely, using portable terminals called ''bricks,'' via the Respondent's wireless dispatch system. They obtain needed parts and supplies at various scattered storage locations, which they visit on no regular schedule. With minor exceptions, they generally work alone, except when, on occasion, CSRs from neighboring areas are assigned to work together on a larger project.[6]

While CSRs jointly attend region-wide meetings, such meetings are held only once a year. Due to the distances required to be traveled, many CSRs do not attend monthly meetings that are held in at least some of the eight or nine territories into which the Southcentral Region is divided. Although some CSRs have attended training classes, the classes were conducted on a national basis and thus included many CSRs from outside the Southcentral Region.

The severe limitations on the CSRs' ability to discuss organization among themselves are illustrated by the measures to which CSR Phillips had to resort in his organizing effort to gather the names and addresses of just his fellow Colorado CSRs. Phillips knew only a few of the CSRs, and the Respondent did not supply its CSRs with a company directory listing the CSRs. Phillips, therefore, ingeniously used his ''brick'' to retrieve the Colorado CSRs' last names and identification codes, which he used to send them messages asking permission to call them at home and requesting their telephones numbers. By diligently telephoning long distance the CSRs who responded, Phillips gathered the names of about 30 Colorado CSRs, some with addresses and telephone numbers, which he provided to Union Organizer Sheridan. Working from this list, Sheridan attempted to locate other CSRs and to gather signed authorization cards. Even with this effort, however, Phillips and Sheridan clearly were unable to communicate with, or even learn of the existence of, a large number of the Colorado CSRs. They filed their initial representation petition based on their calculation that the Respondent employed 38 CSRs in Colorado, while, in fact, the Respondent employed 63 or 78 CSRs in Colorado.[7]

Once the Board, at the Respondent's behest, found the Colorado unit inappropriate and ruled that a region-wide unit was required, the limitations on CSRs' ability to communicate among themselves became even more apparent. Phillips found that, unlike the Colorado CSRs, CSRs elsewhere in the region could not be contacted on his ''brick.'' Moreover, his requests to parts coordinators Hoffman and Shiveley for a list of the CSRs in the region was rebuffed. Sheridan, who contacted some 25 Colorado CSRs, found that none of them knew the names and locations or telephone numbers of unit CSRs outside of Colorado.[8] Accordingly, the record clearly demonstrates that the CSRs across the regionwide unit work in such anonymity and such isolation from each other that their right to discuss organization among themselves is largely illusory.

It is equally evident that the right of union officials to discuss organization with the unit CSRs or, stated differently, the unit CSRs' right to ''learn the advan-

on Company Property, 18 Vand. L. Rev. 73 (1964). Contra *Lechmere v. NLRB*, 502 U.S. 527 (1992). See my concurring opinions in *Loehmann's Plaza*, 316 NLRB 109, 114 (1995), and *Leslie Homes Inc.*, 316 NLRB 123, 131 (1995).

[3] *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972).

[4] 407 U.S. at 542, citing *Thomas v. Collins*, 323 U.S. 516, 533–534 (1945).

[5] 407 U.S. at 543.

[6] The Respondent's regional manager testified that 12 CSRs are permanently stationed at a Wichita, Kansas, Boeing Company plant, 7 or 8 are stationed at a Boulder, Colorado, IBM facility, and a smaller number are stationed at a Kansas City Twentieth Century Insurance facility. Thus, only about 23 of the Respondent's 236 CSRs in the region are permanently assigned to a location at which other CSRs also work.

[7] After the initial petition was filed, the Respondent informed the Board's regional office that it employed 78 CSRs in Colorado. Two months later, when the Respondent supplied the voting eligibility list to the Board's Regional Office, there were 63 CSRs on the list.

[8] This evidence that Colorado CSRs had less ability to communicate with CSRs elsewhere in the region than they did with other CSRs within Colorado was not before the Board in the prior representation case.

tages of self-organization from others,''[9] exists only in theory. The Union has no way to identify or contact the unit CSRs on its own. Unlike the typical work situation, the Union cannot distribute handbills to the CSRs or record their license plate numbers in order to identify them, because there is no place where the CSRs routinely gather. They do not work at any facility of the Respondent and do not report to work or otherwise regularly gather at any common location.[10] Moreover, the Union has no way to identify CSRs, because neither their clothing nor their vehicles bear the Respondent's name or logo. Moreover, as demonstrated by Sheridan's research, advertising in the mass media to attempt to reach the 173 unit CSRs in the 7 States of the region other than Colorado would be ludicrous, given the vast number of print, television, and radio media outlets in those States, the Union's inability to know which ones of them the CSRs read, watch, or listen to, and the tremendous expense of mounting such an advertising campaign.

As the Union had no means of reaching the CSRs on its own, it initially was dependent on Phillips' providing it with the names and addresses or telephone numbers of some of the Colorado CSRs. Once Sheridan received this list, she worked to obtain additional CSRs' names and addresses through contacting the individuals on the list. By this method, the Union succeeded in reaching a sufficient number of CSRs within Colorado to obtain a showing of interest for its anticipated Colorado unit. However, after the unit was expanded to include the entire region, the Union found that it was not able to obtain the names and addresses of CSRs elsewhere in the region by this method.[11] Moreover, as outlined above, Phillips was unable to provide the Union with the names and addresses of unit CSRs outside Colorado. Thus, the evidence demonstrates that the dispersion and anonymity of the CSRs across the Respondent's eight-state Southcentral Region have resulted in their being deprived of their right to ''learn the advantages of self-organization from others,''[12] despite the Union's sustained and persistent efforts to reach them.[13]

I would find that, in the circumstances presented here, where employees' efforts to obtain union representation are severely hampered because, due to the Respondent's unusual operating structure, unit employees are so dispersed and little known to each other that they are effectively deprived of both their right to discuss organization among themselves and their right to learn the advantages of self-organization from union representatives, the General Counsel has established a prima facie case that the Respondent violated Section 8(a)(1) by denying the Union's request for the unit employees' names and addresses which, if provided, would have substantially aided restoration of these rights.

Indeed, the concept is not without precedent that when the right of employees to discuss organization among themselves is diminished, they have a heightened claim on learning the advantages of self-organization from union representatives. In *May Co.*,[14] where the employer maintained a privileged, broad rule prohibiting union solicitation in its department store sales areas during both the working time and nonworking time of its employees, the Board found that the employer violated Section 8(a)(1) by making antiunion speeches to its employees while denying the union's request for an opportunity to address the employees. The Board reasoned that the employer's no-solicitation rule, albeit lawful, ''seriously impaired the right of employees to discuss union organization.''[15] Consequently, the employer's denial of the union's request for an opportunity to address the employees in response to the employer's speeches violated Section 8(a)(1), as it ''seriously impaired the employees' ability to learn of the advantages of union organization from others, and to discuss such advantages among themselves.''[16] The Board reached the same conclusion in *Montgomery Ward*,[17] where the employer unlawfully prohibited employees from discussing the union during the workday and refused the union's request for an opportunity to respond to the employer's antiunion speeches.

[9] *NLRB v. Babcock & Wilcox Co.*, supra, 351 U.S. at 113.

[10] While the Respondent's regional manager testified that some 20 CSRs are permanently stationed at three facilities of customers, see fn. 6, above, it appears that neither Phillips nor the Union was aware of this prior to the hearing in this case.

[11] The judge faults the Union for not recontacting 2 or 3 New Mexico CSRs whom it had encountered early in the campaign, and the Respondent faults the Union for not contacting all 63 Colorado CSRs whose names appeared on the voting eligibility list. In my view, the Union made substantial efforts to reach CSRs throughout the region. Although it did not contact every CSR on the eligibility list or the two or three New Mexico CSRs, it no doubt contacted all the ones who it believed would have been likely to provide it assistance in obtaining the names and addresses of unit CSRs outside of Colorado.

[12] *NLRB v. Babcock & Wilcox Co.*, supra, 351 U.S. at 113.

[13] Contrary to the judge, in my view the Union cannot be faulted for failing to travel to the major cities of the region outside of Colorado to attempt to contact CSRs. The CSRs are virtually unidentifiable, given that they work at scattered, unknown locations and neither their clothing nor their vehicles bear the Respondent's name or logo. Thus, it is hard to see what would have been gained by the Union's undertaking a city-by-city search for CSRs.

[14] 136 NLRB 797 (1962), enf. denied 316 F.2d 797 (6th Cir. 1963).

[15] Id. at 800.

[16] Id. at 802.

[17] 145 NLRB 846 (1964), enfd. as modified 339 F.2d 889 (6th Cir. 1965).

The Supreme Court's decision in *Lechmere*, although not directly applicable to this case,[18] is also instructive. *Lechmere* holds that, as a rule, employers are not required to permit nonemployee union organizers to enter their property to communicate with employees. Entry is required, however, where ''the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.''[19] *Lechmere* states that ''[c]lassic examples'' where entry is required include logging camps,[20] mining camps,[21] and mountain resort hotels.[22] Comparison of these three classic examples to the present case reveals that the deprivation of the rights of the Respondent's CSRs to discuss organization among themselves and to learn the advantages of self-organization from union organizers is analogous to and, indeed, greater than that of employees in all but one of these cases.

In *S&H Grossinger's*,[23] 60 percent of the employees lived and worked on the premises of a mountain resort hotel, from which they rarely departed. The other 40 percent, who lived in nearby villages, traveled to and from work in taxis or private automobiles and, when leaving the hotel premises, were difficult or impossible to distinguish from hotel guests. As a majority of the employees resided and all of them worked on a common premises, they, unlike the Respondent's widely dispersed CSRs, no doubt had abundant opportunity to exercise their right to discuss organization among themselves. Indeed, the court of appeals noted that ''some organization work can be done by employees who are willing to solicit fellow employees.''[24] Moreover, as all the employees worked at a single, stationary location and 40 percent of them lived off the premises, the union apparently had greater opportunity there, however limited, to make contact with the employees than does the Union in the present case, where the Respondent's CSRs are scattered over eight States and have changing work locations that are unknown to the Union.

Similarly, in *Alaska Barite*,[25] the employees lived and worked in a mining camp on an island along the Alaskan coast. On weekends, they normally left the island and went to Petersburg, a community of 2000 residents, where some of the employees had homes. As they lived and worked during the week at a common location, they presumably had plentiful opportunities to exercise their right to discuss organization among themselves. Moreover, they spent their weekends in a small community where the union conceivably could have contacted them. Thus, the employees in *Alaska Barite* were less deprived of their right to discuss organization among themselves and, arguably, less deprived of their right to learn the advantages of self-organization from union representatives than are the Respondent's scattered, isolated CSRs.

Consequently, in my view, there is a stronger basis to find that the Respondent violated Section 8(a)(1) by refusing to provide the Union with the CSRs' names and addresses to enable them to communicate and be informed about self-organization than there was to find even in these ''classic example'' cases that the employers violated Section 8(a)(1) by failing to allow unions to enter on private property to communicate with employees about the advantages of self-organization.[26]

Finally, I note that disclosure of employees' names and addresses has always been viewed as a less intrusive measure than requiring employers to admit nonemployee union organizers onto their property. For example, In *SCNO Barge Lines*,[27] the Board found that by denying union organizers access to its towboats on which crew members stayed for 30-day periods the employer did not violate Section 8(a)(1), because the employer had provided the union the names and home addresses of its employees. In a companion case, *G.W.*

[18] *Lechmere* sets forth the rule governing situations in which nonemployee union representatives seek entry onto an employer's property to communicate with employees, and the employer bars their entry or expels them from the property. In the present case, the Union does not seek to enter onto the Respondent's property. Rather, the Union merely seeks to obtain the names and addresses of the employees in the bargaining unit. Consequently, because here, unlike in *Lechmere*, there is no conflict between Sec. 7 rights and the Respondent's control of its real estate, *Lechmere's* test, which governs such conflicts, does not apply.

Moreover, in *Excelsior Underwear*, 156 NLRB 1236 (1966), the Board rejected the contention that, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), which first set forth the rule governing entry on property reiterated in *Lechmere*, barred requiring employer disclosure of employee names and addresses unless the union would otherwise be unable to reach the employees with its message. The Board found that the existence of alternative channels of communication was not relevant because employers have no significant interest in the secrecy of employee names and addresses. As requiring disclosure of employee names and addresses would not interfere with a significant employer interest, the Board found application of the stringent *Babcock* test unwarranted.

[19] 502 U.S. at 539 (emphasis omitted), quoting *Babcock*, 351 U.S. at 113.

[20] Citing *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948).

[21] Citing *Alaska Barite Co.*, 197 NLRB 1023 (1972), enfd. mem. 83 LRRM 2992 (9th Cir. 1973), cert. denied 414 U.S. 1025 (1973).

[22] Citing *NLRB v. S&H Grossinger's Inc.*, 372 F.2d 26 (2d Cir. 1967).

[23] Id.

[24] 372 F.2d at 29.

[25] Supra, 197 NLRB 1023.

[26] The third ''classic example'' case, *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948), concerned employees who lived and worked at a lumber camp at which the employer interfered with employee discussion of organization as well as barred the union from visiting the employees.

[27] 287 NLRB 169 (1987), review denied sub nom. *National Maritime Union v. NLRB*, 867 F.2d 767 (2d Cir. 1989).

Gladders Towing Co.,[28] the Board found that a similar employer's denial of union access to its towboats violated Section 8(a)(1) where the employer had denied the union's request for the names and addresses of its employees, leaving the union no possible means of communicating with the employees short of access to the towboats.

Similarly, in *NLRB v. Tamiment, Inc.*,[29] the court of appeals found that the employer's denying access to the union to communicate with employees at the employer's resort hotel at which 85 percent of the staff lived did not violate Section 8(a)(1), where, inter alia, union organizers had failed to request a list of the employees' names from the employer. The court distinguished *S&H Grossinger's*,[30] where the Board's finding of an access violation by a similar employer had been enforced, noting that the union in that case had requested and been denied a list of the employees' names.

As all these cases view obtaining employee names and addresses as a measure to be attempted before an employer would be ordered to permit entry of union organizers onto its property, it is clear that disclosure of employee names and addresses is seen as a less intrusive measure than compelling entry onto property. Consequently, disclosure of employees' names and addresses need not be reserved only for circumstances that would warrant compelling entry onto property.

Finally, the Supreme Court, which has articulated a presumption against nonemployee union organizing access to company property in *Lechmere*, has upheld in *Wyman-Gordon*[31] union access to names and addresses under the *Excelsior* rule. Accordingly, aside from the less intrusive role ascribed to names and addresses in the union access to company property cases, extant Supreme Court authority establishes the propriety of broad union access to names and addresses.

For the foregoing reasons, I find that the General Counsel established a prima facie case that the Respondent violated Section 8(a)(1) by denying the Union's request for the names and addresses of the CSRs in the bargaining unit. I agree with my colleagues that the judge erred in dismissing the complaint, and I join them in remanding the case for further proceedings.

[28] 287 NLRB 186 (1987).
[29] 451 F.2d 794 (3d Cir. 1971), cert. denied 409 U.S. 1012 (1972).
[30] Supra, 372 F.2d 26 (2d Cir. 1967).
[31] *NLRB v. Wyman-Gordon*, 394 U.S. 759 (1969).

Wanda Pate Jones, Esq., for the General Counsel.
S. Richard Pincus, Esq. and *Joshua D. Holleb, Esq. (Fox & Grove)*, for the Respondent.
Victoria L. Bor, Esq. (Sherman, Dunn, Cohen, Leifer & Yellig, PC.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This matter is before me on Respondent TSS' motion to dismiss made at the conclusion of the General Counsel's case-in-chief. When the motion was made, I indefinitely adjourned the hearing to allow the General Counsel and the Charging Party to file memoranda in opposition to the motion. Those oppositions were filed on August 20, 1996. Subsequently, Respondent sought and obtained leave to file a response. That was received on September 17, 1996. The memoranda have all been carefully considered.

Based on the complaint, the evidence and the arguments made by all parties, I conclude that Respondent's motion must be granted in full.

I. BACKGROUND

This entire matter arises against the background of a representation petition, filed by the Charging Party on April 26, 1995,[1] (the second petition), entitled Technology Service Solutions, Case 27–RC–7557. That petition sought a representation election in a proposed bargaining unit composed of Respondent's ''customer service representatives . . . in the State of Colorado.'' As a result of that petition the Regional Director conducted a hearing and on June 9, issued a Decision and Direction of Elections, finding as appropriate voting units two separate organizational groups within Colorado (and small portions of south-central Wyoming, western Nebraska, and northeastern New Mexico) known as ''Territory E'' and ''Territory X'' (called Colorado for convenience).

Respondent delivered a list of the names and addresses of the employees in those two voting units pursuant to the requirement of the Board's *Excelsior* rule to the Regional Director. It also filed a request for review with the Board asserting that these were inappropriate units, and that the only appropriate unit was one composed of all eight of its territories in its Southcentral Region, an organizational group covering eight States or portions thereof.[2] The election proceeded by mail ballot and the ballots were impounded pending the Board's ruling. The Board granted the request for review, eventually reversing the Regional Director on July 20. [Unpublished order; unofficially published at 149 LRRM 1302 and 1995 Lexis 891.] It agreed with Respondent that the appropriate voting unit should consist of customer service representatives (CSRs) employed throughout the Southcentral Region. As a result the matter was remanded to the Regional Director for further proceedings; the ballots were not counted. He advised the Charging Party that its showing of interest in the larger unit was insufficient to warrant an election, but did grant additional time to allow it to obtain more signatures. The Union, instead, filed a motion dated July 31 to lower the showing-of-interest requirement. Respondent filed an opposition and on August 2 the Regional Director denied the motion. The Regional Director thereupon dismissed the petition. The Union then filed with the Board a request for review of the dismissal, reasserting its motion to lower the

[1] All dates are in 1995 unless otherwise indicated.
[2] Colorado, New Mexico, Kansas, Oklahoma, Missouri, Arkansas, south-central Wyoming, and western Nebraska. See Jt. Exh. 6 for a map of all the territories.

showing-of-interest requirement. Respondent filed an opposition. On September 5 the Board denied the request ''as it raises no substantial issues warranting review.''

II. THE COMPLAINT

On July 25, 5 days after the Board's reversal of the Regional Director and 6 days before the Union moved to lower the showing-of-interest requirement, the International organizer assigned to the Charging Party, Rosemary Sheridan, wrote a letter to Respondent's regional manager, Tom Shackelford, requesting a list containing the names and addresses of Respondent's CSRs employed in the Southcentral Region. On July 31, Shackelford denied the request.

The instant charge was filed on August 2 but the complaint did not follow until May 9, 1996. It contains two discrete allegations. It first asserts that Respondent in June, acting through Customer Service Manager Rod Leonard, violated Section 8(a)(1) of the Act by threatening an employee (Dennis Phillips) with discipline if he called employees about union organizing, and ''by implication'' both promising him a pay increase if he refrained from organizing activity and threatening to withhold a pay increase from him if a union became the employees' bargaining representative.

Second, it asserts that Shackelford's denial of the list of names and addresses of its employees violated Section 8(a)(1) of the Act solely because ''there was no reasonable alternative means for the Union to communicate with the [Southcentral Region] employees.'' In no other way has the General Counsel asserted that Respondent has denied the Union access to its employees.

III. EVIDENCE REGARDING THE ORGANIZING EFFORT

Most of the hearing was devoted to describing the nature of Respondent's business. Much of that description replicated evidence taken during the course of the representation case. It may be shorthanded here.

Specifically, Respondent is a joint venture between IBM Corporation and Eastman Kodak Company. It is headquartered in Pennsylvania but the regional office involved here is in the Denver suburb of Englewood. Respondent's principal business is to provide computer repair services to commercial customers. These customers have been acquired in various manners. Some are personal computer manufacturers obligated to provide warranty or service contract work to their customers; others are businesses which contract directly with Respondent for service and maintenance. To provide those customers with the appropriate diagnosis and repair work, Respondent has hired, at least in its Southcentral region, approximately 150 service technicians, the CSRs. Most of these individuals work out of their own homes. They can be found throughout the region in various communities ranging in size from major cities to small towns. Some are based in the complexes of their customers. For example, in Wichita, a group of CSRs works solely within the confines of the Boeing Aircraft plant. In Boulder a group works at an IBM facility. Furthermore, the larger the town, the more likely Respondent is to have hired multiple technicians for that community.

Those CSRs who are not stationed within a customer's facility, the vast majority, and who are assigned to the town in which they live, must communicate with their dispatcher by means of a portable terminal (known as a PT or brick) or a small IBM computer called a Thinkpad. Depending on the CSR's location the devices have both radio and land-line capability. CSRs may also use ordinary telephone lines for oral communications with the dispatcher.

For the most part, the CSRs' duties require them to travel to a customer's site and make physical repairs to the computer which requires service. Often such service involves the installation and configuration of computer hardware. That commonly means the installation of new parts. Each CSR has access, by one means or another, to a parts depot. First, each CSR is supplied with a company truck which carries a supply of frequently needed computer hardware. That truck is kept supplied through an inventory control system. In addition, remotely located CSRs have been authorized to create depots in their town. Usually these are publicly rented ministorage lockers. The CSR who needs access to such a storage facility uses it on a frequent but irregular basis. To replenish the parts which have been used requires the CSR to maintain a running inventory on his electronic communication devices. In larger towns, TSS may have arranged for access to an independent wholesaler or vendor. In addition, parts often need to be specially ordered. Respondent relies on common carriers such as Federal Express or United Parcel Service to deliver the parts, which are usually held at the delivery service's office or concession (frequently a commercial mailbox company) for pickup by the CSR; sometimes they are delivered to his home, depending on his arrangement with the carrier. Those parts, too, are generally provided by a vendor independent of Respondent. That vendor may be a computer manufacturer, a component manufacturer, or a wholesaler. It is less common for Respondent to keep replacements in its own inventory, except for standard parts. Sometimes parts are delivered directly to the customer prior to installation.

Although a CSR usually works alone, on occasion more than one CSR can be assigned to a larger project, such as installing a network on the premises of a commercial customer. If that occurs, CSRs are brought to the project as necessary, usually from their own or a nearby town. Furthermore, they are invited, if not directed, to attend meetings of one sort or another where CSRs are present. These include annual regional ''kickoff'' meetings, monthly territory meetings, and certain types of training sessions. The territory meetings, at least in Colorado, are held in the Denver area. Often, however, the CSRs located elsewhere in the State choose not to travel that far. Minutes of those meetings are provided for them so they can stay abreast of events. Training sometimes takes place on a national, not regional basis. The CSRs may have interaction with others from different territories at those sessions. There is evidence that the Colorado CSRs can communicate with each other on the PT via short memos, assuming they know each other's code number or other identifier. There is additional testimony that they have made unsuccessful efforts to use the brick and/or Thinkpad to try to find other CSRs elsewhere in the Southcentral region. Either they haven't figured out the proper coding or the equipment limits them to Colorado or to the E and X territories. All this simply means that most of the CSRs who are located in cities by themselves have very little interaction with fellow CSRs. That is not necessarily true in cities where there are larger numbers of CSRs.

The evidence also shows that organizer Sheridan has attempted to find out more about Respondent as a business and the identities of employees in the other States. Her effort has been limited to perusing telephone books, using the International Union's database, and contacting representatives of sister Locals in some of those States, apparently simply asking them if they had any knowledge about TSS. Her endeavors have been unsuccessful. Early on, during the Colorado portion of the organizing drive, she did make contact with two CSRs from the main New Mexico territory, but has not since followed that lead. She explained that at the time she was only interested in Colorado CSRs. She has rejected the use of the press and radio/TV as a means of seeking Respondent's CSRs in the other seven States, deeming those means too expensive and not sufficiently productive. It is also true, however, that she has not actively priced advertising in those media in those States, relying on her Denver-area knowledge and 10 years of organizing experience to draw that conclusion. She did not even use the maps which Respondent had introduced in evidence during the representation case hearing. They provide some important clues which could have been pursued. It is fair to infer that although Sheridan has expended some energy trying to find out about Respondent's CSRs in the other States, it has not been a great deal.

IV. EVIDENCE WITH RESPECT TO DENNIS PHILLIPS

With respect to its treatment of CSR Dennis Phillips, the complaint asserts that his manager, Rod Leonard, on June 15, restricted Phillips from calling employees about unionization and ''impliedly'' promised him a pay increase if he refrained from union activity, simultaneously ''impliedly'' threatening him with a loss of the pay increase if he did not refrain.

As the case now stands, Phillips is the only person who has given first-hand testimony about the incident; Leonard has not yet testified, although Region Manager Shackelford did offer some background testimony when called as an adverse witness. It is Phillips' testimony with which I must be concerned. Has he, or has he not, given evidence which is trustworthy enough to rely on to require Respondent to defend the complaint? Put another way, has the General Counsel presented evidence on which a finding of a violation could be made if Respondent chose not to defend Phillips' testimony? Or, traditionally, if viewed in the light most favorable to the General Counsel, does Phillips' testimony withstand the motion to dismiss? At the outset it should be understood that credibility issues usually do not withstand a motion to dismiss. Nonetheless, as the trier of fact, I am not barred from making a credibility finding where the witness is unable to present evidence in a manner not flawed by internal inconsistency.[3] Here, Phillips has given several versions of his recollection. These versions are not only at odds with one another, in one circumstance he made significant omissions and in others he directly recanted the versions relied on by the General Counsel. Moreover, in the effort to rehabilitate himself, he was unable to credibly resupport the recanted version or explain the omissions.

Prior to providing the NLRB's Regional Director (through a field investigator) with an affidavit, Phillips had begun jotting a few short notes to himself in order to keep his recollection fresh. The notes were made at different times on different slips and were later transferred to the back of a large envelope. The envelope bears a postage meter date of June 28, 1995, which shows only that the notes were placed on the envelope after that date; original notes may or may not have preceded that date, and at least one entry was made on the envelope after the others had been consolidated on it.

He used the notes to assist himself in preparing the NLRB affidavit dated August 10. That affidavit was composed by the Board investigator after a telephone conversation with Phillips and mailed to him for his signature. He did not inform the investigator about his notes but did turn them over to counsel for the General Counsel a day or two before the hearing.

Phillips gave another written statement to one of Respondent's attorneys on June 12, 1996, about 6 weeks before the hearing and about a month after the complaint issued.[4] That statement was taken face to face, rather than by telephone, and contains Phillips' initialed interlineal corrections which he asked for.

In his testimony before me, Phillips introduced the June 15 (or so) conversation with Leonard, by first explaining that Leonard had asked to meet him in Glenwood Springs (about 100 miles from Phillips' base in Grand Junction). When they met Phillips says Leonard dealt first with some business matters, then complained that the upcoming election was going to cause him to miss a family reunion and he held that misfortune against Phillips. Even so, says Phillips, Leonard told him that he would not tell Phillips to vote against the Union, ''that that was my personal decision.''

The conversation then turned to the use of the brick, covered by complaint paragraph 5(a). Prior to the filing of the election petitions, Phillips says he had attempted, by an early morning message on the brick, to reach various coworkers each day asking them for their home telephone number so

---

[3] When cases are tried to a judge, the judge is not barred from assessing the sufficiency of the evidence, including the general credibility of witnesses, before the defense is asked to proceed. See *Royal Zenith Corp.*, 263 NLRB 588 (1982), and *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 676 (1993); also *Continental Casualty Co. v. DLH Services*, 752 F.2d 353, 354 (8th Cir. 1985). See also Fed.R.Civ.P. 52(c) applicable to the United States district courts and which provides guidance here:

> *Judgment on Partial Findings*. If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim, counterclaim, cross-claim or third party claim that cannot under controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence . . . .

In this connection, Moore's 1995 *Federal Practice Rules* pamphlet says, at 522, ''Where a judge acts pursuant to Rule 52(c), the judge is the trier of fact and may therefore weigh the evidence and make credibility determinations.'' Board Rule 102.35(h) is not inconsistent.

[4] That statement appears to have been in accordance with the safeguards required by the Board in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964). It was taken by one of Respondent's attorneys, Joshua D. Holleb, and was witnessed by Phillips' supervisor, Rod Leonard. It is clear that Phillips understood the safeguards. He even testified that he knew he could have left the interview, but chose not to. The last paragraph of the statement and an attachment both recite its voluntary nature. In addition, in the last paragraph Phillips acknowledges that he was not obligated to sign it and says he was not offered any inducement to sign.

he could call them at home in the evening to talk about the Union. During the June conversation, he says Leonard told him he had received a complaint from a coworker (apparently George Montana, though Leonard did not tell him the complainant's name) who had asserted that Phillips was bothering him via the brick. Phillips testified: ''And he said I was sending messages on the PT and calling at home, or something like that. I don't really remember what he said there, whether I—whether he included calling on the phone or not. But he said I was bothering them on the PT . . . .'' Phillips denied it, saying that he had only used the PT to send one message as described above. After he explained why he wouldn't harass anybody, he says Leonard replied he would not accept the denial, and ''[I]t was to be stopped, that I wasn't to do it any more and that if I did, if he had another complaint, I would be disciplined.'' Phillips repeated his denial and asserted it would not happen again (if it ever had). It did not.

The General Counsel then asked whether Leonard had given any additional instructions about the use of the brick. Phillips replied: ''[Leonard] told me that I absolutely could not harass anybody on the phone or on the PT . . . .'' When asked ''What about calling? What about calling someone on the PT or on the phone?'' Phillips carefully answered, ''Well, he told me that I couldn't use the PT to call about union—you know, union—the organization of the union. I couldn't do that. But that is all I remember right now.'' He never testified that Leonard interdicted him from communicating with other CSRs by telephone.

His envelope notes omit entirely any references to a threat of discipline for using the brick for union purposes, even though he says he made notes about the June 15 conversation immediately after it ended while he was driving home. Yet, in his NLRB affidavit he says Leonard forbade him from telephoning fellow CSRs about the Union. Both the notes and the NLRB affidavit mention Leonard's complaint about the family reunion.

Phillips modified his description in the June 12, 1996 statement. He said of the June 15, 1995 meeting with Leonard:

> Rod informed me that another CSR in his territory complained to Rod that he had received messages on his PT regarding the union and he did not want to receive such messages. Rod said to check with the CSR first before sending PT messages about the union. Rod said that if I did send unwanted PT messages I could be subjected to discipline. Rod did not tell me that I could not use the PT to send messages to CSRs regarding the union. Rod did not tell me that I was disciplined. I do not believe I was disciplined regarding this matter. Rod did not tell me I could not otherwise communicate with CSRs regarding the Union.

Obviously, these inconsistencies are serious enough to fell the paragraph 5(a) portions of Phillips' direct testimony. He omitted any references to a threat of discipline in his notes, despite taking them shortly after the incident, and omitted any reference to the use of the PT or telephone even though they must have been the most significant portion of the conversation, at least considering the level of denial which he says he was forced to make. In his NLRB affidavit he describes interdictions of union-connected conversations on both the computers and the telephone. Yet, he would not add the telephone in his live testimony. Finally, of course, his 1996 statement places the entire matter in a noncoercive context, simply saying that if he used the brick for communicating about the union, he should get the recipient's permission first to assure that it was OK. He adds that Leonard never told him he couldn't use the PT to talk about the union, nor did Leonard bar him from ''otherwise'' communicating with fellow CSRs about the Union.

Because of Phillips' inconsistencies here, I find that his testimony is insufficiently solid to make findings of fact supporting the version alleged in the complaint. Paragraph 5(a) of the complaint will be dismissed pursuant to the motion.

Paragraphs 5(b) and (c) are both connected to the pay matter. These, too, arise from Leonard's conversation with Phillips on June 15 (or shortly thereafter). Phillips thinks it all happened in the same conversation but concedes that the pay discussion may have been a week later because of the presence of another employee. Whatever the sequence, he remembers Leonard telling him that pursuant to an earlier conversation which they had had in May, Leonard confirmed that his raise would be effective July 1. Phillips went on to remark about pay in connection with the Union. He said:

> And he [Leonard] mentioned that—he said, ''Hopefully''—you know, I guess he said something about, you know, ''What can the union do for you that we can't do,'' you know. And he said, ''You know, we give you raises; We—you know, we—here is a salary increase that won't be taken away from you.''
>
> And then he said, ''Unless the union takes over; then I can't''—he said, ''We won't take it away.'' But he said, ''Depending on the negotiations, I don't know whether you will keep it or not; . . . that will be up to union negotiation.'' So that is all I remember. [Quotation marks and punctuation inserted for clarity.]

His NLRB affidavit is not as complete. He does refer to Leonard informing him of a 5-percent raise, and to Leonard's remark, ''What can the Union do for you that we can't do?'' After answering that the Union could get him a contract which would allow him to keep the raise and give him security, he agrees that Leonard told him he was not going to take the raise back. The reference to what might happen during negotiations was not mentioned.

In his 1996 statement, he simply said, with respect to paragraph 5(b), ''Rod never, directly or by implication, promised me a pay increase if I refrained from Union activity.'' Similarly, with respect to paragraph 5(c), he said: ''Rod never, directly or by implication, threatened to me, or to my knowledge, to any other CSR, that pay increases would be withheld if a union were selected as a collective bargaining representative for TSS employees. The only thing that Rod said was that if the union was voted in wage increases would be subject to bargaining between TSS and the union.''[5]

[5] Although not offered substantively, one of the notes on his envelope says: ''Got 5% raise Day Before I went vac. to Illinois. Rod said if Union got in I might not keep raise because Union might not be able to negotiate as good of contract.'' His direct testimony does

Continued

The General Counsel attempted to rehabilitate this witness by again going over the same ground and the witness did revert, giving testimony nearly identical to that which he gave on direct. He also asserted that when he gave the 1996 statement, Holleb questioned him through the use of leading questions (the definition of which I made certain he understood). When asked for examples of the sort of leading question which Holleb used, he gave examples of direct questioning. He also sought to recant the June 12, 1996 statement saying he had not brought his reading glasses to the interview, suggesting he had been tricked into signing something which was not true because he had been unable to read it closely. Unfortunately, that is belied by the corrections he made on the document, together with his initials.

In those respects, I am afraid that the effort to rehabilitate Phillips only made him look worse. The balance of it is that regarding all of paragraph 5 of the complaint, the General Counsel has not presented sufficiently credible evidence to warrant directing Respondent to defend. There really is no ''best light'' available in which to place the General Counsel's case. Phillips has simply told the stories in too many opposites to accept the one which the General Counsel prefers. The motion to dismiss must be granted with respect to paragraphs 5(b) and (c) as well.

V. ANALYSIS OF RESPONDENT'S PUTATIVE OBLIGATION TO PROVIDE EMPLOYEES' NAMES AND ADDRESSES TO THE UNION

At the outset, it must be observed that insofar as the remainder of the complaint is concerned, there is no dispute that Respondent has done nothing affirmative to bar the Union from organizing its employees. It has not threatened any employee, surveilled any employee (or given the impression thereof), made promises, changed its payroll practices, claimed futility, or barred organizers from any location. The complaint does not allege any of these or similar types of violations. Instead, the complaint, supported by legal argument, asserts that Respondent is under an affirmative obligation to provide a list of the names and addresses of its employees at the outset of its organizing attempt. The General Counsel agrees that the theory is untested and that there is no case law in support of the contention.[6] It argues that the so-called ''unique'' circumstances extant here warrant a departure from the ordinary rule obligating a union to organize without the assistance of the employer.

It does appear that Respondent's manner of doing business would make it difficult for a union to organize it. Its employees are scattered and they do not report to a centralized location. Even so, there are large concentrations of CSRs in Albuquerque, Wichita, Oklahoma City, Tulsa, Kansas City, Springfield, and Little Rock, as well as Denver. Presumably, these locations allow/require employee society at least to the same extent as seen in the Denver territories. Thus, while organizing may be difficult, the task is not impossible. That is clearly so as the Union did succeed in organizing the two Colorado territories. Had the Union pursued the New Mexico connections or actually traveled to the cities where Respondent's CSRs are concentrated, it may have had better success than it has had so far.

Furthermore, while the General Counsel asserts that Respondent's business organization is unique, I cannot agree. Throughout the nation there are many businesses whose employees are scattered, whose work requires them to travel around the community where they live, who use portable terminals or other electronic communicators, and who do not physically report to a central location, save perhaps an inventory depot. Route salespeople and delivery personnel of varying types come to mind, as do home health personnel. These industries have been organized by several unions. For that reason I am not persuaded, on a factual basis, that the General Counsel has shown that Respondent offers an organizational challenge any greater than any other company whose operations are spread somewhat thinly.

Yet, the above observations, to some extent, beg the real question: Has Respondent done anything, except for being in existence, which calls on the remedial authority of the statute? The General Counsel asserts that Respondent's operational structure and its declination of the list of names and addresses is sufficient. I do not agree.

Respondent's letter denying the request for the list would certainly never be an unfair labor practice in the ordinary prepetition case. The Board has never so held. Of course, since 1966 production of such a list has been mandatory after an election has been ordered. See the discussion below. Before that moment, however, an employer is free, if not obligated, to keep such information private. There are many legitimate reasons to keep such information in-house. The absence of such a list does not in any way prevent any employee from seeking information about union organizing from any source which he or she may wish. Nor does it prevent a labor organization from broadcasting its message in any way it chooses. When an employee contacts a union, as Phillips did here, the union is usually able to ''network'' itself into reaching the remaining employees. Indeed, the Union used Phillips as its starting point for Colorado and succeeded without such a list. It did not even think to ask for a roster insofar as Colorado is concerned. The absence of such a list did not interfere with, restrain, or coerce a single Colorado employee from exercising his or her Section 7 right to learn about the advantages and disadvantages of unionization. Likewise, the absence of a list will not interfere with, restrain or coerce a single employee in the other States.

Moreover, it seems to me, if an employer is required to provide such a list in preorganizing circumstances, several problems will quickly develop. How does one judge if one's business is so unique as to obligate it to provide such a list? If an employer provides it to one union, must it also provide it to others? How does an employer deal with the concerns of employees who wish to maintain their privacy? Will it be in conflict with Section 8(a)(2) as an inappropriate preference—some sort of aid or assistance? Would it be used to

---

not go so far. I regard it as simply another example of Phillips' inability to provide adequacy in proof.

[6] In general, under Sec. 8(a) of the Act, a remedial order under Sec. 10(c) mandating the production and delivery of a list of names and addresses to a labor organization is regarded as an extraordinary remedy, i.e., one which is necessary to remedy an unusually egregious unfair labor practice. It has rarely, if ever, been granted. See *Hospitality Motor Inn*, 250 NLRB 1189 (1980), and *Fairleigh Dickinson University*, 253 NLRB 1049, 1051 fn. 3 (1981). The unfair labor practices found in those cases were relatively routine refusal to bargain cases and in both instances the General Counsel's effort to obtain lists of employee names and address was rejected, for extraordinary remedies were not needed.

put more than one union in the field, thereby dividing the votes so that no union could obtain a majority? These and other knotty problems would be created if a prepetition requirement for the production of such a list were imposed. Thus, an employer who declines such a request has really done nothing all to advance or impede the Union's interest. I conclude that an employer who declines to provide such a list is only doing what he is obligated to do—remain neutral and leave the union to its own devices in obtaining the material necessary to support a petition. The General Counsel, however, argues otherwise. I refer his representatives to the statute.

Section 8(a)(1) of the Act provides: ''It shall be an unfair labor practice for an employer—to *interfere with, restrain, or coerce* employees in the exercise of the rights guaranteed in section 7;''[7] As we all know, verbs, such as those italicized here, express action. Thus, a state of being is simply insufficient to achieve the action these verbs require, at least under the plain meaning rule. Moreover, except in cases where the law requires an affirmative duty to act,[8] the Board has always required a Respondent to have performed some sort of definite action before determining that it is an unfair labor practice requiring a remedy. Indeed, it is the deed itself which constitutes the unfair labor practice. Some unfair labor practices don't take much in the way of action, but there is always something. Thoughts and stasis are not enough. A survey of the entire field is not necessary to make the point. Moreover, such a survey would be enormous. I give several examples.

The first involves one of the most common unfair labor practices under Section 8(a)(1), creating the impression of surveillance. It requires an employer, at the very least, to have ''seemed'' to have been observing employees who were engaging in protected Section 7 conduct. In *Medical Mutual of Cleveland*, 248 NLRB 441 (1980), the General Counsel alleged the creation of the impression of surveillance when the manager of training development told an employee who had been asked by another supervisor to leave a managers' meeting that the personnel manager had asked why she had left, also asserting that the personnel manager had made a somewhat ambiguous statement referring to the employee's union sentiments. The judge, affirmed by the Board, said:

> Defining the outer limits of such an unfair labor practice is not without difficulty. Nonetheless, Morgan's expression could only be deemed unlawful through a hypersensitive, technical, and most unrealistic application of statutory principles. Woods' departure from the meeting was at the instance of a management representative and in his presence. It is difficult to imagine that such an overt act would be anything but common knowledge of a type hardly of alarm to Woods when reiterated by Morgan. The 8(a)(1) allegation based thereon shall be dismissed. [Id. at 443; footnote omitted.]

I note that the judge, as I do here, initially looked to the statutory underpinning—referring to the ''unrealistic application of statutory principles.'' He then looked to see if there could be a coercive impact. Finding neither statutory underpinning nor coercive impact he dismissed the allegation. At least in that case, the General Counsel could point to a conversation as the overt act, minimal, to be sure, but still something active. Despite that, the judge could find no impact on a Section 7 right.

Similarly, the Board reversed a judge in an 8(b)(2) hiring hall discrimination case. The judge had been unable to find an overt act constituting evidence that respondent union had caused the employer to first lay off employees who were not union members, as prohibited by Section 8(b)(2). The Board looked to the culture and surrounding circumstances to find an implied agreement outstanding between the two, the overt act which the judge looked for but could not bring himself to find, lacking hard evidence. *M. W. Kellogg Constructors*, 273 NLRB 1049 (1984).[9]

The General Counsel has stated in its brief that the balancing test (property rights v. Section rights) most recently discussed by the Supreme Court in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), ''and its precursors''[10] does not apply in this case because private property is not involved. I am not certain I fully agree, but first point out that in the private property cases, the overt act was always, at the very least, an implied threat to bar entry and to enforce the bar by invoking the trespass laws or something similar in the case of vessels on the high seas or in navigable waters. The threat in those cases may never have actually been uttered; nonetheless it is an understood part of the analysis of whether or not the employer had taken a step, however small, toward interfering with the employees' right to listen to ''the advantages and disadvantages of union organizing.'' [Phrase taken from *Central Hardware*, supra.]

It is fair to say, therefore, that the 8(a)(1) verbs, ''*interfere with, restrain, or coerce*'' invariably require some act or conduct by a respondent which, in this context, may objectively be seen to hinder employees from gaining knowledge about his or her protected options in the workplace.[11] I do not see,

[7] Sec. 7 of the Act states in pertinent part: ''Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid protection, and shall also have the right to refrain from any or all such activities.''

[8] Affirmative duties to act may be found in the good-faith bargaining obligation under Sec. 8(d) and Sec. 8(a)(5), such as the duty to provide information, or where there may be a fiduciary (or quasi-fiduciary) obligation to affirmatively inform an employee of a statutory right such as the Board has recently imposed in the compulsory union dues area. *California Saw & Knife Works*, 320 NLRB 224 (1996). There is no such affirmative requirement found in Sec. 8(a)(1).

[9] Remanded 806 F.2d 1435 (9th Cir. 1986), decision reaffd. 284 NLRB 506 (1987).

[10] I.e., *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and apparently, that portion of *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), which directs the Board to follow the *Babcock* test. *Lechmere* was the subject of a similar directive.

[11] Respondent makes a fascinating legislative history argument supporting the requirement that Sec. 8(a)(1) requires an overt act. It points out, citing to 1 Leg. Hist. 3 (NLRA 1949), that in 1934, Senator Wagner's first bill (S. 2926), contained language which could reasonably be interpreted to refer to nonactive means to impair employees from the right to organize. See proposed sec. 5(1) of that bill. Respondent further notes that the language was omitted from the 1935 act (S. 1958). From that change, Respondent argues that the Wagner Act and its successors intended to prohibit action, not

Continued

however, that an employer has done anything to invoke the remedial process of Section 10(c) of the Act in simply arranging its business in a manner which has the incidental effect of making it difficult to organize. Such an employer has done nothing to obstruct its employees from pursuing those rights. It has simply established a business designed to meet the needs of its customers. The National Labor Relations Act has never found that to be an unfair labor practice, nor I submit, by definition as enacted by Congress, could it. Section 10(c) requires the Board to issue a cease-and-desist order. Frankly, I am at a loss regarding the phrasing of such an order. Would it be a direction to ''cease and desist'' establishing its business in such a manner as to prevent employees from living in their own town?; from serving customers in the locations near their station? Or, on the affirmative action side, how may it be said that providing the Union with a list of its employees' names and addresses affirmatively remedies the manner in which the business is arranged, if that is the unfair labor practice? Instead, wouldn't the appropriate remedy be to require Respondent to rearrange its business so that the employees could more easily communicate with one another (perhaps at the expense of good business practices)?

Obviously, any such an order would be an absurd direction in which to take the Act. I do recognize that sometimes orders need to be specially tailored to reach unusual circumstances. See, for example, the order requiring an offshore oil rig construction company to provide a means whereby its crew could meet onshore with union representatives. *McDermott, Inc.*, 305 NLRB 617 (1991). Yet, *McDermott* is another example of a company which had committed an overt act; at first it had declined to answer the union's letter requesting access to its live-aboard barges, an implied bar; later it refused access, though it did allow, on one occasion, an inadequate period at the dock to meet a departing crew. It also offered (later reneging) to notify the union of the dates and times of crew changes. As a result, a balancing and tailored remedy became appropriate.

The point is simply this: Section 10(c) does not authorize the Board to order a respondent to do anything unless it has committed an unfair labor practice.

Having said that, I make one more observation about the General Counsel's case. It relates principally to the nature of the Union's efforts to reach Respondent's CSRs in States other than Colorado. Sheridan is an organizer for the International assigned to the Charging Party. She had available the assistance of at least 5 other International organizers in Colorado and the help of about 10 people from the Local.[12] She also had available the entire resources of the International's organizing department. Despite all this, none of them actually traveled to any other State; thus no one from the Union ever tested its capability in the other States. Sheridan decided it was too difficult and instead sought to have the Board modify its showing of interest requirement. Had the Union tried in the other States, it might have succeeded or it might have failed. Indeed, we know that Sheridan had early found at least two New Mexico CSRs who were ignored. With those facts in mind, I quote from the Fourth Circuit Court of Appeals: ''A union with a highly professional organizational department should make at least a serious attempt to organize a company before it can complain about lack of access to the employer's property. It seems improbable, moreover, that a union could achieve organizational success with lackadaisical efforts such as are in evidence in this case.'' *Hutzler Bros. v. NLRB*, 630 F.2d 1012, 1017 (1980). It may be that the court's comment is a little too harsh to apply to the Charging Party, but an essential kernel of truth lies within it. The Union never properly pursued the remainder of the unit established by the Board. If it doesn't make the effort, the law will not. Unlike the remote worksite cases, these people are not inaccessible.

Finally, from the Board's decision in reversing the Regional Director, requiring the Union to seek a divisionwide bargaining unit, as well as its subsequent affirmance of the Regional Director's insistence on an ordinary showing of interest in the larger unit, it is quite apparent that the Board has already spoken on the subject. Normally, in representation matters, the Board first administratively requires a petitioner (in an RC case, a labor organization) to demonstrate that there is a sufficient showing of employee interest in a representation election, 30 percent of the proposed voting unit. After unit and related matters are resolved, of course, under the Board's decision in *Excelsior Underwear*, 156 NLRB 1236 (1966), decided under Section 9 of the Act (which governs representation cases), the Board requires the Employer to provide a list of eligible employees, together with their full names and mailing addresses. Thus, a list identical in nature to the one which is sought here is available under routine representation procedures. Unfortunately for the Charging Party, the Board has already denied such a list to the Union in the expanded unit, because it did not have a sufficient showing of interest; neither would the Board administratively reduce it to a figure of less than 30 percent. That, of course, required the Union to proceed in the usual fashion, but it was also an effective denial of a prepetition list of names and addresses. Now the General Counsel, in proceeding here under Section 8, wants to circumvent that decision, even though no unfair labor practices have been committed.

I find the General Counsel's decision to proceed most puzzling. That office is well aware that the Board knew what problems the Union faced. The Board could see, from the evidence in the representation case, as well as by the contentions made by the Union in its motions, that the Union would have a difficult time in organizing the remainder of the unit. After all, the CSRs were spread throughout the additional states and they worked in the same manner as those

passivity. Certainly that is the way the Sixth Circuit looked at the Wagner Act in the mid-1940's: ''Interference, coercion, and domination are active processes. They may, of course, be inferred from a course of conduct even though no overt acts are proved . . . .'' *NLRB v. Clinton Woolen Mfg.*, 141 F.2d 753, 758 (1944); followed in *NLRB v. Mt. Clemens Pottery Co.*, 147 F.2d 262, 266 (1945). As attractive as that argument may be, I do not think it is necessary to go beyond the plain meaning of the verbs in question. They clearly require action.

[12] Sheridan testimony, Tr. 472–474.

in Colorado. Yet it also knew that the Union had succeeded in organizing the Colorado portion and it undoubtedly believes that the Union can succeed with the remainder of the unit. The Board has, it seems to me, held that shortcuts are not available under the statute insofar as this voting unit is concerned.

Considering all the circumstances, the complaint must be dismissed.

ORDER[13]

The complaint, insofar as it alleges Respondent to have violated Section 8(a)(1) of the Act is dismissed in its entirety.

[13] A request for review of this order dismissing complaint may be filed with the Board pursuant to Board Rule 102.27.